Rowland Trucking Company, a Division of Unichem International *and* Kenneth L. McLaughlin. Case 28-CA-6948

30 April 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 28 March 1983 Administrative Law Judge Russell L. Stevens issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Rowland Trucking Company, a Division of Unichem International, Carlsbad, New Mexico, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(b).

"(b) Remove from its files any reference to the discharge of Kenneth McLaughlin on May 22, 1982, and notify him in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against him."

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT violate Section 8(a)(1) of the Act by threatening and interrogating our employees concerning their union activities; creating the impression among our employees that their union activity was under surveillance; advising an employee that he was the first to be discharged for union activity, but would not be the last; telling an employee that other employees would be discharged for engaging in union activity; informing employees that their union activity was under surveillance by us; and telling employees that we would not allow their union activity, and would seek a reason to discharge an employee because of his union activity.

WE WILL NOT violate Section 8(a)(3) and (1) of the Act by discharging Kenneth L. McLaughlin or any other employees because of their union activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Kenneth L. McLaughlin immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL remove from our files any reference to the discharge of Kenneth L. McLaughlin on 22 May 1982, and notify him in writing that this has

[1] The General Counsel has moved to strike and disregard portions of the Respondent's submissions and to censure counsel for the Respondent on the basis that the Respondent's submissions contain a vicious and inappropriate attack on the General Counsel's witnesses and a scurrilous attack on the professional honesty and integrity of the General Counsel. After carefully reviewing the record we have come to the conclusion that counsel for the Respondent's attacks are completely unsubstantiated. While we will not strike the Respondent's exceptions, we note that this is not the first time that attorney Leonard L. Pickering has engaged in such unprofessional, inappropriate, and completely unwarranted tactics. In *Frank Paxton Lumber Co.*, 235 NLRB 582, 586-587 (1978), the Board adopted the judge's decision directing a note of condemnation to Pickering "for his resort to intemperate, inflammatory, scandalous and wholly unfounded personal attack upon the professional integrity of counsel for the General Counsel," citing Disciplinary Rule 7-102(A)(1) of the Code of Professional Responsibility of the American Bar Association. We renew our condemnation of Pickering's conduct with the hope that we shall not be required to institute disciplinary proceedings against him in his subsequent appearances before the Board.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. We also find totally without merit the Respondent's allegation of bias and prejudice on the part of the judge.

We clarify the judge's statements in part III,A,1 of his decision, concerning the New Mexico Employment Security Department hearing at which McLaughlin testified, by noting that McLaughlin appeared at that hearing as a witness on behalf of Bill Lawrence.

been done and that evidence of this unlawful discharge will not be used against him in any way.

ROWLAND TRUCKING COMPANY, A DIVISION OF UNICHEM INTERNATIONAL

DECISION

STATEMENT OF THE CASE

RUSSELL L. STEVENS, Administrative Law Judge. This case was tried in Carlsbad, New Mexico, on September 28, 29, and 30, 1982, and December 14, 15, and 16, 1982; and was reopened 1 day on March 8, 1983[1] on motion of counsel for Respondent.[2] The complaint, issued July 6, is based on a charge filed June 1 by Kenneth L. McLaughlin, an individual.[3] The complaint alleges that Rowland Trucking Company, a Division of Unichem International (Respondent), violated Section 8(a)(1) and (3) of the National Labor Relations Act.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and Respondent.

On the entire record,[4] and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is, and at all times material herein has been, a corporation duly organized under the laws of the State of New Mexico, with an office and place of business in Carlsbad, New Mexico, where it is engaged as a common carrier in interstate transportation of liquid products. During the past 12 months, which period is representative of its annual operations, Respondent, in the course and conduct of its interstate operations, received gross revenue in excess of $50,000.

Respondent admits, and I find, that Respondent is, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Chauffeurs, Teamsters, and Helpers Local 492, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union) is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*[5]

Respondent has a fleet of approximately 16 tractors and trailers which it uses to haul liquids, mostly brine and fresh water, for customers primarily involved in drilling operations. Many places where the trucks are driven are in remote areas served by rough country roads. Some of the trucks are quite large, and haul as much as 86,000 pounds of liquid. Because of the nature of Respondent's business and the roads where its trucks are used, mechanical problems, including broken springs, are common.

Respondent's business has an office, a yard, and a shop where mechanical work is done on equipment. Drivers have a separate room where they may congregate or relax when not driving. The drivers' room is located in an area separate from the office and the shop.

Respondent's drivers are paid by the hour, and when not driving they stay in the drivers' room or elsewhere on the premises, available for dispatch as needed. They are paid the same amount each hour they are on duty, whether or not they are driving. Horseplay among drivers while they are unoccupied is common in the yard, in the office and the drivers' room, and elsewhere on the premises. On several occasions Respondent has warned drivers not to engage in horseplay, but those warnings largely have been ignored.

This case primarily involves Kenneth L. McLaughlin, who was one of Respondent's truckdrivers from October 15, 1981, until he was fired May 22, 1982. McLaughlin previously worked for a mining company as a truckdriver, and has been a member of the Teamsters Union approximately 14 years. McLaughlin was active in attempting to organize Respondent's drivers, as more fully discussed below. McLaughlin contends that he was fired because of that activity, and Respondent contends that he was fired solely because he was responsible for breaking three springs on his truck within a period of 30 days, in violation of a company rule that had been announced to all Respondent's drivers. In addition to the alleged 8(a)(3) violation, Respondent is alleged to have violated

[1] All dates hereinafter are within 1982 unless stated otherwise.

[2] Pursuant to a motion filed by counsel for Respondent, granted by me, this matter was reopened on March 8, 1983, to take allegedly newly discovered evidence in the form of testimony by Clarence McDonald. The motion filed by Respondent's counsel was based on the allegation that McLaughlin attempted to bribe McDonald into testifying favorably for him at the trial herein; and further, on the allegation that counsel for the General Counsel accompanied McLaughlin during a portion of the time that McLaughlin spent with McDonald during the alleged bribe attempt.

McDonald's testimony clearly established that McLaughlin did not attempt to bribe, nor did he bribe, McDonald. McDonald's testimony is given no weight in assessing McLaughlin's credibility. Further, on the basis of McDonald's testimony, it is apparent, and is found, that counsel for the General Counsel was not a participant in any improper conversation between McLaughlin and McDonald.

The General Counsel filed a motion dated March 15 asking inter alia that Respondent's motion to reopen be struck and that Respondent's counsel be censured for unwarranted personal attack on counsel for the General Counsel and his witnesses. Respondent's motion to reopen was based on alleged credibility matters, and the substance of the motion is disposed of supra. Official censure of Respondent's counsel is not within my authority. It is noted that Respondent's counsel engaged in some intemperate description of, and references to, individuals as discussed by counsel for the General Counsel, but that intemperate language did not obscure the facts of the case as found herein.

[3] Individuals are referred to herein by their last names.

[4] Counsel for the General Counsel's motion to correct the transcript, made in his brief, was not opposed and is granted.

[5] This background summary is based on stipulations of counsel and on testimony and evidence not in dispute.

Section 8(a)(1) of the Act on several occasions, as discussed below.

B. *McLaughlin's Discharge*

1. McLaughlin's union activity

After his discharge McLaughlin filed a claim with the New Mexico Employment Security Department, which held a hearing at which McLaughlin testified. McLaughlin stated, inter alia:

> What information do you have to present?
> A. Well, there was a little union business scare about which I got terminated for, and I feel that Mr. Lawrence was terminated on the same grounds. And I didn't have anything to do with it, other than making one phone call; but, anyway, it all got laid on my doorstep and so, anyway, I feel that Mr. Lawrence was fired for the same setup because we run around together all the time.[6]

McLaughlin testified quite differently herein, as did some other witnesses. McLaughlin testified at trial that he talked on the telephone with a representative of the Union in mid-April, at the request of several of Respondent's drivers, and that the representative explained the steps to be taken and sent to him blank authorization cards to be filled in and signed by employees.[7] McLaughlin said he handed approximately 16 cards to employees, some of which cards were signed and returned to him, and some of which were mailed by employees to the Union.[8] He said he talked with several employees concerning the advantages of unionization. He also stated that other drivers talked about the Union, and handed out authorization cards. McLaughlin testified that he was very secretive about his union activity since he feared getting fired if that activity was known to Respondent, and he further testified that he has been fired from two prior jobs because of his union activity.

Parker testified that he often has heard rumors about employees trying to organize, but that he knew nothing about the union activities of McLaughlin or any other employee until after McLaughlin was fired. Several witnesses testified that they heard nothing about McLaughlin's union activity before McLaughlin was fired. In this connection, much trial time was devoted to the union card of Frank Stone,[9] which is dated May 18, 1982, is addressed to the Union in Alburquerque, New Mexico, is marked "not deliverable as addressed, unable to forward," and is postmarked in Carlsbad, New Mexico, May 19, 1982. Parker testified that he did not receive the card, which was erroneously placed in Respondent's post office box rather than being returned to Stone, until May 24 or 25, which was after McLaughlin was fired. Stone testified that he filled in and signed a second card after misdelivery of the first one, but that the second one was signed after McLaughlin was fired. Several witnesses testified that they heard about Stone's card falling into Respondent's hands, but that they heard about if after McLaughlin was fired. John Priestley, one of Respondent's drivers who later quit his job, testified that on May 20 he saw Guye showing a card to Mike Roberts, who is Respondent's shop foreman,[10] and that a little later he asked Roberts if it was a union card, since he was fearful it may be his own. Roberts replied that it was not Priestley's union card. Roberts testified that the conversation was on May 24, and not on May 20. Guye testified that Respondent received Stone's card on May 24. Priestley's testimony on this subject was self-contradictory, uncertain, and unconvincing. His recall of the date of the conversation between Guye and Roberts was equivocal. Guye testified that he knew nothing about McLaughlin's union activity or about any employee having signed a union authorization card as of the time McLaughlin was discharged. Guye said he knew nothing about Stone's union card until he picked up the mail, during Parker's absence, on May 24, the first Monday after McLaughlin's discharge. Guye testified that he had no interest in the union activity of Respondent's employees, and that he made no effort to learn who had signed union cards. Parker testified that he did not see Stone's union card until after McLaughlin was discharged. May Oden, a window clerk for the U.S. Post Office in Carlsbad, credibly testified that, theoretically, it would have been possible for Stone's card to have gone to Albuquerque and back to the Carlsbad Post Office by May 22, but that, as a practical matter, such was highly improbable. Her conclusion was that the card probably would not have been placed in Respondent's post office box until Monday, May 24. On careful review of all the testimony and evidence, it is found that Stone's first signed union card was not received by Respondent, or known about by it, until May 24.

Although McLaughlin stated to the State Employment Security Department that his only involvement in union

[6] Lawrence is not involved in this controversy.

[7] Much trial time was devoted to McLaughlin's testimony that his union affiliation was shown by a union button that he wore, and by a union decal on his automobile. The button is a very small device, approximately the size of a dime, that he wears on his belt, and the decal was not exhibited at trial. Based on my personal observation, and the testimony of many witnesses, the belt ornament is not identifiable except upon close examination. It cannot reasonably be inferred, or found, that the button indicated union affiliation within Respondent's knowledge. Scant evidence was adduced that any person ever saw, or was aware of, the decal. This testimony is given no weight. It is found that Respondent was not aware of McLaughlin's union affiliation through the button or the decal, or the two of them.

McLaughlin testified that, when he was hired by Wray Guye, Respondent's field supervisor (Guye's supervisory status is not in dispute), or possibly some time later, he told Guye that he was, and had been approximately 14 years, a member of the Union, and showed Guye his union card. Guye denied this statement by McLaughlin. This testimony by McLaughlin is given no credence.

Employee Thomas Alexander, who has been a driver for Respondent more than 1 year, customarily in cool weather wears a jacket with a Teamsters insignia on it, approximately 3 or 4 inches in diameter. Alexander credibly testified that no supervisor of Respondent ever asked him about the insignia, and he also stated that the jacket has been washed, and that the insignia no longer is legible. This matter also has been considered. Parker testified that he had seen the decal on Alexander's jacket, and that he had assumed when Alexander was hired that he had been a union member on a previous job.

[8] In evidence as G.C. Exhs. 7(a)–(f) are six signed cards of employees, properly identified at trial and dated May 14, 24, and 25.

[9] G.C. Exh. 2.

[10] Roberts' supervisory status is not in dispute.

activity was to make a single telephone call to a union representative, he testified to rather extensive involvement, and that testimony credibly was corroborated by witnesses Priestley, Russ Corbett, and Russell Mee. Corroboration is implied by the testimony of Parker, Guye, and other witnesses relating to events after McLaughlin was fired that show his union activity prior to being fired.

It is quite clear, and it is found, that McLaughlin was one of the Union's principal advocates among Respondent's drivers.

2. Respondent's knowledge of employees' union activity

(a) Paragraph 11(a) of the complaint alleges that, on or about May 20, Roberts created an impression among Respondent's employees that their union activities were under surveillance by Respondent.

Counsel for the General Counsel did not argue this allegation in his brief, except cursorily, nor did Respondent. Apparently the allegation refers to the testimony of Priestley, who testified that, when he asked Roberts if the card Guye gave to Roberts was a union card, Roberts asked, "Has somebody been passing out union cards to sign?" Roberts testified that his version of the conversation did not include such a question.

Discussion

As pointed out above, Priestley's testimony on this subject was contradictory and unconvincing. It is inadequate on which to base a finding that Respondent violated the Act as alleged. It is apparent that the conversation was a very short one and that, regardless of its content, it was no more than a cryptic exchange of question and response. It seems unlikely that Priestley was the target of any remark that gave the impression of surveillance of union activities. Roberts said he turned and walked away when Priestley told him that Priestley knew what Guye had given him was a union card. That testimony by Roberts was believable and convincing, and is credited.

No violation of the Act is found, relative to this allegation.[11]

(b) Paragraph 11(b) of the complaint alleges that, on or about May 21, Guye threatened employees with discharge because they joined or assisted the Union. Paragraph 11(c) of the complaint alleges that, on or about May 21, Guye created the impression among employees that their union activities were under surveillance by Respondent.

These allegations refer to the testimony of Corbett, who is, and has been for approximately 18 months, one of Respondent's drivers. Corbett testified that the day before McLaughlin was fired Guye told him that he knew who the ringleader of the union movement was, and that he would be "kicking cans, or fired." Guye denied Corbett's testimony.

Discussion

Corbett was a difficult witness in that he seemed confused and inexact. However, his testimony as quoted above seemed solid, and he remained firm on cross-examination, even though he was confused concerning some peripheral matters. His core testimony was quite convincing, and he is credited. His credibility was enhanced by the fact that Parker, his boss, sat through his testimony.

These allegations of the complaint were proved.

(c) Paragraph 11(d) of the complaint alleges that, on or about May 21, Guye threatened employees with plant closure because of their union activities.

This allegation partially refers to Corbett's testimony. Corbett initially testified in a confused manner, and stated that plant closure as a possible result of union activity was of concern to, and a common topic of conversation among, all employees. He linked Guye with that talk only by implication and assumption, and after being led by counsel. Finally, Corbett testified:

> So it could be that Guye, personally, did not say to you, in front of you, anytime, anything to the effect that the yard would be closed if the union got in; is that correct?
>
> A. Yes, sir.

Patently, Corbett's testimony does not support the allegation and no violation is found.

However, although not alleged in the complaint, an unlawful interrogation was exposed during Corbett's cross-examination, and is found. Corbett credibly testified:

> Q. And Guye said nothing more to you, on that occasion, other than to make this one statement, that he knew who the ring leader was and that he would soon be kicking cans?
>
> A. Well, they asked about if I had seen the union cards being passed around.
>
> JUDGE STEVENS: Now who is they, who asked this?
>
> THE WITNESS: Well, Gerry, Gerry asked me about the union cards being passed around.[12]
>
> Q. (By Mr. Pickering) On that same occasion?
>
> A. Yes, sir.
>
> JUDGE STEVENS: Now what was it he asked you?
>
> THE WITNESS: He asked me about—
>
> JUDGE STEVENS: No, not about, just tell me the words that he used, the best that you can recollect?
>
> THE WITNESS: Okay. He said—he asked me if I knew anything about the union cards being passed around.

(d) Paragraph 11(e) of the complaint alleges that, on or about May 21, Guye warned employees that those

[11] Respondent questioned nearly all of Respondent's drivers during trial as to whether or not they had been threatened, interrogated, given promises, or otherwise harassed concerning their union activities. The answers nearly always were no, but that is irrelevant so far as the General Counsel's specific allegations are concerned. Respondent's general character is not in issue.

[12] "Gerry" refers to Guye.

employees who were prominently identified with the Union's organizational campaign would be discharged.

This matter is not argued by counsel as an independent violation of the Act, and no violation is found. The essence of the allegation is found elsewhere herein, and an appropriate remedy is recommended below.

(e) Paragraph 11(f) of the complaint alleges that, on May 22, Guye advised an employee that he was the first employee to be discharged for engaging in union activities, and that he would not be the last.

This allegation refers to the conversation McLaughlin had with Guye when McLaughlin was fired. The discharge is discussed in detail infra. McLaughlin testified that he talked with Guye in the morning of May 22 when he was fired:

> Yes, Mr. Parker was there, but he never spoke to me. And another thing that I forgot to mention that Mr Guye said, after he had finally said no, there's no more discussion, this is it, he said, "Before you do I would like for you to explain one thing to me." And I said, "Well, if I can." He said, "How come it is that you people come here and hire out for a specific wage and right off you think the Company owes you more money?" I said, "Gerry, have I ever come in this office and complained about anything other than wanting more overtime?" He said, "No, I can't say that you have." And I said, "Well, I don't guess I know what you are talking about." He said, "Yeah, I think you do, now you're the first to be fired over this, but I guarantee that you're not the last." He said, "There's a long list right behind you."

Guye denied this statement by McLaughlin. Parker, who was present during part of the conversation, also denied McLaughlin's testimony on this issue.

Discussion

If the statement was made as alleged by McLaughlin, it clearly would constitute a violation of the Act. Further, it would be a violation whether it was made prior to McLaughlin's discharge or immediately thereafter, since McLaughlin's discharge was a violation of the Act, as found infra, and McLaughlin continued to be an employee within the meaning of the Act. The only question is one of credibility.

Neither McLaughlin nor Guye was a totally credible witness. As discussed herein, both witnesses testified to matters that are not credited. The record as a whole clearly shows that Respondent was annoyed by the union organizational attempt in which McLaughlin was a leading figure, and it further shows that McLaughlin's discharge partially was based on pretextual reasons. McLaughlin was far from an ideal employee, as discussed later, but so were other employees who were retained even after abuse of Respondent's trucks. Guye's explanation of McLaughlin's discharge appeared strained and unlikely.

It is found that McLaughlin's testimony on this issue is accurate, and he is credited. Based on that credit, a violation of Section 8(a)(1) of the Act is found as alleged.

(f) Paragraphs 11(g) and (h) of the complaint allege that, on May 22, Guye told an employee that other employees would be discharged for engaging in union activities, and informed employees that their union activities were under surveillance by Respondent.

Apparently, although not so argued by counsel for General Counsel, these two allegations cover the testimony set forth in (e) preceding. Technically, the allegations are included within the testimony quoted above, and violations are found as alleged.

(g) Paragraph 11(i) of the complaint alleges that, on May 22, Roberts threatened employees with plant closure if they selected the Union as their bargaining representative.

McLaughlin testified that, shortly after Guye discharged him, he talked with Roberts:

> Yes, sir. As we was talking out to my truck, Mike made the statement, he said, ". . . you guys are crazy for trying to get a union started here." He said "things are pretty slow" and said that everybody knew it, that they would shut this place down and move all these trucks back to Hobbs, before they'd let a union get started.
>
> Q. Did you say anything to him?
>
> A. I said, "Well, it just depends on what the men want, I guess, Mike."

Roberts denied this testimony by McLaughlin.

Discussion

Parker denied ever stating anything about closing the plant, and Respondent introduced testimony to show that, in fact, Respondent had no desire to, or intention of, closing the plant. However, that denial by Parker and the testimony to show that Respondent did not or would not close the plant are irrelevant to this issue.

The only question is whether or not Roberts made the statement attributed to him by McLaughlin. Based on observation of the two witnesses, and assessment of their testimony against the record, McLaughlin is credited and a violation of the Act, as alleged, is found.

(h) The General Counsel called Dennis McDowell, a mechanic and truckdriver for Respondent from May 18, 1981, until November 1982, to testify on rebuttal. McDowell testified that, approximately 1 week before McLaughlin was fired, Roberts talked with him, shop mechanic John Richard Johnson, and shop employee John Hutchinson. McDowell testified that Roberts stated to the three employees that "if the Union come into Rowland Trucking, that Mr. Brakey[13] would close the doors and take it back to Hobbs [note: Hobbs, New Mexico]." McDowell further testified that, 3 or 4 days before McLaughlin was fired, he walked into the parts room, where Roberts was talking with Johnson:

> Well, when I walked in, Mike was telling Richard that they needed to go over Kenny's truck with a fine-tooth comb to find anything that they could tell Mr Parker that was broke on anything.

[13] Brakey is Respondent's vice president.

. . . .

> Excuse me just a minute. They did also state that they had to report to Mr. Parker because that was going to be reasons to get rid of Kenny.

Roberts and Johnson denied McDowell's testimony, and Parker denied ever giving instructions to any employee to find an excuse for firing McLaughlin.

Discussion

These statements were alleged in the complaint as having been made on June 9.

Whether or not Parker ever actually issued instructions for mechanics to find a reason to fire McLaughlin is immaterial, so far as an 8(a)(1) violation is concerned. However, if in fact such instructions were issued, that fact would be relevant so far as McLaughlin's discharge is concerned.

Any (a)(1) violations as a result of McDowell's testimony would have to rest on credibility resolutions. McDowell was a thoroughly impressive witness. He no longer works for Respondent and, so far as the record shows, has no reason to give false testimony. He was calm, straightforward, and sincere. He answered questions easily and without hesitation, and his testimony was not shaken by cross-examination or by other witnesses. McDowell is credited, and it is found that Respondent violated section 8(a)(1) of the Act by threatening to close its plant, and by asking fellow employees to find reasons to fire McLaughlin, because of the latter's union activity.

(i) Paragraph 11(k) of the complaint alleges that, on June 9, Parker threatened employees with plant closure if they selected the Union as their bargaining representative.

Mee testified that, at an uncertain time a week or two after McLaughlin was fired, he planned to quit his job with Respondent and that he asked Parker for a recommendation.[14] During the course of their conversation Parker accused Mee of having a bad attitude. Mee testified:

> I said that I was just not satisfied about the way things had been handled around there, the way the drivers had been treated, why we couldn't get our trucks and stuff fixed, and the subject came up on why Bill Lawrence was dismissed. And I told Mr. Parker I could undersand why Bill was dismissed over his attendance, because he did have poor attendance at work. He was always coming in late.
>
> I said, but I couldn't understand why Kenny had been discharged for a spring, when other employees, there at the Company, had cost the Company several more dollars, thousands more dollars than Kenny had ever done up there with just a few broken springs. There had been gentlemen rolling the trucks up there and I said, "I believe he was fired over his union activities." And Mr. Parker, at that point, said, "Well, we can't have that kind of activities around here." And that's about the best that I can remember about the conversation.

Mee further testified that, 3 or 4 days later, he and Parker again talked about the Union and Parker stated "they would close the doors at Rowland before they would allow the Union to come in."

Parker denied Mee's testimony.

Mee is credited, and an 8(a)(1) violation is found, as alleged.

Mee also testified that, on June 22, after McLaughlin was fired, Parker told him "they hired people, gave them good jobs, paid them good salary and all they wanted to do was to bring in the Union." However, Mee was equivocal in attributing this statement to Parker, and no finding is made on the basis of this testimony.

3. Respondent's animus

Based on the foregoing it is clear, and it is found, that Respondent was opposed to union organization of its employees and to McLaughlin's part therein as an active union advocate, and that Respondent expressed its opposition through actions that were in violation of Section 8(a)(1) of the Act.[15]

4. McLaughlin's discharge

a. *Stated reasons for the discharge*

McLaughlin testified that Guye called him into the office when he reported for work on May 22, informed him that there was a broken spring on his truck which was the third spring he had broken within 30 days, and told him "this is it," which McLaughlin accepted as a discharge. McLaughlin disputed the statement about three broken springs, they discussed it in detail, and McLaughlin left.

Guye testified: As of the time McLaughlin was discharged, Respondent did not have a consistent policy whereby drivers were discharged for abuse of equipment. Each case was judged independently, on its own merits. Some drivers were not fired, even though they might have broken springs or abused equipment much the same as others who were fired. In 1982 the rule was established whereby a driver almost automatically was fired when he broke three springs within 30 days,[16] regardless of the severity of the break and regardless of the location of the spring.[17] The new rule was established in

[14] Mee quit his job with Respondent in July 1982. After reading his affidavit to refresh his recollection, Mee said this conversation was on June 22.

[15] Respondent introduced much testimony to the effect that McLaughlin, Priestley, and Mee, and possibly other employees, conspired to bring this controversy to trial and to start other legal actions for the purpose of making large sums of money, in addition to harassing Respondent. That testimony has been considered, and given the weight to which it is entitled.

[16] Guye contradicted himself in that he testified that the 30-day rule was established prior to McLaughlin's discharge, and McLaughlin "was one of them that got caught in it."

[17] Testimony established that trucks sometimes may be operated with springs that are cracked, or only slightly broken, if the springs are located on trailers or in noncritical locations. Some broken springs preclude any further operation of the truck. All springs have several leaves, and the seriousness of breaks depends in some measure on the location in the spring of the leaf that is broken.

January, and it was announced to the drivers at a safety meeting that month. At the same time, a safety bonus program was announced, but one broken spring caused a one-third loss of the bonus; two broken springs caused a two-third loss; and three broken springs caused total loss of bonus and job. On May 21 Guye participated in a routine nightly check of trucks[18] with Roberts and Johnson. Roberts found a broken right front trailer spring on McLaughlin's truck, No. 811, and reported it to Guye. Guye checked the records, and saw that McLaughlin had three broken springs within the past 30 days. Guye returned home after the check, reported the matter by telephone to Parker, who was home that night, and recommended that McLaughlin be fired. Parker agreed, and said he would take care of it the following day. The next morning Guye talked with McLaughlin, told him he had broken three springs within 30 days, and fired him. McLaughlin did not dispute the statement that he had broken three springs within 30 days, and said possibly he drove too fast the preceding day. McLaughlin said he did not check his truck thoroughly the prior evening after work.

Parker testified: McLaughlin had been a problem employee since April 1982. He was observed driving several miles off his route; he consistently abused his trucks; he drove too fast, and carelessly; he loafed a lot on the job; he made a joke of work instructions; he refused to accept work criticism; he complained about the kind of work he had to do; he engaged in excessive horseplay; and, on one occasion, approximately a week before his discharge, he was warned that he would be fired unless his work performance improved, and "he grabbed me around the collar . . . with a knife in his hand and made some sly remarks."[19] McLaughlin was told on five or six occasions to quit driving so fast. A month before his discharge, the entire front end of McLaughlin's truck had to be repaired. All employees are given a set of Respondent's rules,[20] which they must follow, but they were not adhered to by McLaughlin. At a safety meeting on January 5 employees were told there was a new policy relative to abuse of equipment, and McLaughlin attended that meeting. The new policy was set forth orally; it never was reduced to writing.[21] Parker corroborated Guye's testimony relative to the discharge interview, and further testified that McLaughlin was fired not only because of the broken springs, but also because of all the other problems Respondent had with him.

[18] The fact that such checks routinely are made each 10 days or 2 weeks was established by the record, and is not in dispute.

[19] This knife incident, according to Parker, was a serious incident that occurred in the presence of several drivers. However, McLaughlin denied that he ever threatened Parker with a knife, and no witness corroborated Parker's testimony on this subject. Based on the testimony of several witnesses, many drivers engaged in horseplay, and McLaughlin probably was the worst offender of all. His horseplay frequently included brandishing a knife. However imprudent and ill-advised his actions may have been, Parker's attributing the knife incident to an intent by McLaughlin to threaten or intimidate him simply is not believable. This piece of testimony by Parker clearly was an effort to depict McLaughlin as a dangerous person; this testimony is given no credence.

[20] G.C. Exh. 3. McLaughlin testified that he was told of some of the rules, but that he never has seen a copy of them.

[21] This policy is the same one previously testified to by Guye.

b. *The broken springs on truck no. 811*

McLaughlin acknowledged that he reported, and was charged with, a broken spring that was repaired April 24,[22] but he contended that he had been off work 2 days when it was reported, and he denied that he broke the spring. He said his truck was in the shop for repairs when he reported back to work. The fact that a broken spring on McLaughlin's truck was repaired April 24 is not in dispute, and is shown by Respondent's records. Guye credibly testified that it is the driver's responsibility to check his truck each night and report anything wrong, including a broken spring. If an unreported broken spring is found the next day by a mechanic or supervisor, the person to whom the truck is assigned is charged with the broken spring, even though he may not have broken it, unless he can prove otherwise. Roberts credibly testified that he talked with Guye about the broken spring of April 24, because it was a serious break located on a drive spring. It is clear that McLaughlin either broke this spring, which he did in fact report, or can be assumed to have broken it. In any event, Respondent's records show that McLaughlin was charged with responsibility for the break, and McLaughlin did not try until the trial to get a reversal of that responsibility.[23] His attempt at trial to duck the responsibility was not convincing.

Another broken spring on truck no. 811 was replaced on May 3. McLaughlin had not reported this broken spring, although he drove the truck on May 1, 2, and 3. The break was discovered by a mechanic on May 3. McLaughlin denied responsibility for this spring, but Respondent's records, and its established policy relative to assigning responsibility for broken springs, clearly place the matter in McLaughlin's hands. Guye credibly testified that, based on his review of Respondent's records, this spring was included within the group for which McLaughlin was fired.

The principal controversy relative to broken springs is centered on the third one. As noted above, Guye and Roberts saw the spring during their inspection of trucks the evening of May 21. After Guye and McLaughlin concluded the discharge interview, McLaughlin went to where his truck was parked and Roberts showed him the broken spring. McLaughlin testified that the break was a hairline crack, which could be seen only by crawling under the truck and scraping the dirt away from the crack with his knife. He said he did not previously know about the break, and could not have seen it except upon an unusually close inspection. Priestley and Mee partially corroborated McLaughlin relative to the nature of the break. Johnson testified that he replaced the broken spring, that more than a hairline crack was involved, and that he could see the break from outside the truck, looking under the fender. Respondent's records show replacement of the broken spring. Respondent introduced photographs of the spring Respondent says was

[22] McLaughlin acknowledged that he broke a spring on his truck in January.

[23] McLaughlin testified that he protested being sent home because of this spring, while it was being repaired, but he did not pursue the matter, so far as the record shows.

broken,[24] and a spring was brought into court which Respondent contends is the one in question. McLaughlin denied that the photographs and the spring in court were the same spring that was on his truck, but Johnson identified them as being the same. Roberts and Guye corroborated Johnson's description of the break, and identified the pictures and spring as showing, and being, the one they found on McLaughlin's truck May 21. To the extent there are discrepancies in testimony between the groups of McLaughlin, Mee, and Priestley and of Roberts, Guye, and Johnson relative to this spring, the latter three are credited. It is found that there was a broken spring on truck no. 811 the evening of May 21, which was McLaughlin's responsibility.

c. *Abuse of equipment by drivers*

The record is replete with examples wherein drivers have abused Respondent's trucks. Parker and others testified at length concerning warnings to all drivers about their speeding and abusing equipment, about frequent safety meetings that involved abuse of trucks, about bonuses for proper driving, and about problem drivers who wrecked and damaged trucks. Respondent constantly has equipment under repair, and broken springs are common. High turnover of drivers, very heavy loads, and poor back roads over which hauls are made, all contribute to Respondent's problems with its trucks.

Nearly all witnesses testified that broken springs are frequent, serious, and a source of trouble and concern to Respondent, but it is apparent that broken springs are not all alike. Testimony established that, depending on the location of the spring and the nature of the break, a spring may or may not have to be replaced immediately. Sometimes they are not replaced at once, and are left in place until an opportune time to replace them arises. Respondent contends that it is rare for a broken spring to be left on a truck at all, but several of the General Counsel's witnesses credibly testified to the contrary and cited instances wherein broken springs were left on trucks for extended periods of time.

In addition to broken springs, Respondent's trucks frequently suffer other damage. The General Counsel's witnesses credibly testified relative to trucks and trailers that have been wrecked and damaged in a number of ways. Some of that damage has been very costly—far more so than a broken spring. Parker testified that one driver (Robinson) damaged a truck to the extent of a $14,000 or $15,000 loss and received a traffic citation for the incident, yet was left on the payroll.

d. *Discipline of drivers for abuse of equipment*

There is some testimony to the effect that drivers are sent home while their trucks are under repair for abusive damage, including broken springs, but that testimony is contradictory and ambiguous. If such a policy exists, it is of fairly recent origin, and is unevenly applied.

Parker testified relative to the discharge of several drivers wholly or partially because of abuse of equipment. His testimony was supported by company records in the cases of three such drivers.

Discussion

Guye's testimony makes it clear that, but for the new 30-day rule, McLaughlin's discharge would be a judgment call. McLaughlin was not a careful driver, and the record makes it apparent that he loafed a lot the last month or two of his employement and frequently engaged in horseplay, but it is equally apparent that other drivers were careless with equipment, had serious accidents that were their fault, loafed, and engaged in horseplay without being fired. Parker testified that he personally warned McLaughlin on several occasions about his careless and fast driving, but McLaughlin credibly denied that he ever was warned that he could lose his job, although all employees were warned during safety meetings about driving too fast and abusing equipment, and Respondent never warned McLaughlin in writing. It is clear that McLaughlin was in good standing with Respondent prior to April 1982[25] and, as discussed above, Respondent knew of, and resented, his union activity commencing the last part of April. The suspicion is strong that, regardless of the alleged 30-day rule, McLaughlin was the target of Respondent's union animosity, and that suspicion ripens into a virtual certainty when the testimony of McDowell is considered. That testimony shows that Respondent was after McLaughlin, whether or not it took another broken spring to get him.

Parker attempted to paint McLaughlin as a knife-wielding assailant, but that attempt patently was a sham. The record shows it to be without merit, and establishes that the incident was just another of McLaughlin's ill-advised pieces of horseplay which Parker recognized as such. Parker went further, and stated that McLaughlin was fired for many reasons, including fast and careless driving, abuse of equipment, loafing, refusing to follow work instructions, complaining, and others. Parker did not ground his stated reason for firing McLaughlin upon the 30-day rule, but rather upon McLaughlin generally being a poor employee. In any event, it was Guye who did the actual firing, albeit after consultation with Parker.

Guye testitied that McLaughlin was fired solely because of the 30-day rule, which rule, he stated, almost was automatically applied. That testimony is suspect. Guye did not give a convincing reply when he was asked why he felt it necessary to call Parker at home, at night, to recommend that McLaughlin be fired. If the rule automatically was applied, there would be no need to call Parker or confer with anyone. Parker came to work at 5 a.m., and certainly nothing could be done between Guye's call and 5 a.m. to process a discharge that was automatic anyway. Further, Guye testified that never in the past had he called Parker at home to recommend a discharge. In any event, it seems unlikely that there ever was a 30-day rule. Mee, McLaughlin, and Priestley testified that they never knew of such a rule, and no employee of the many who testified said anything

[24] G.C. Exh. 37.

[25] Parker acknowledged this fact.

about such a rule. Further, Parker did not rely on such a rule when he testified about McLaughlin's discharge. Finally, such a rule would be so inflexible that its use would seem highly unusual. Springs may be broken for any number of reasons, good and bad, and the seriousness of the breaks depends on many factors. It would be unfair, and unlikely, for Respondent to apply the rule if one or two springs were broken because of carelessness, and the third was broken within 30 days through no fault of the driver. Guye's testimony that McLaughlin was fired because he broke an alleged 30-day rule is found to be pretextual.

In summary, McLaughlin was not an exemplary employee, but it appears that Respondent accepted him with all his faults until he started engaging in union activity. When Respondent learned of that activity, it decided to get rid of him. The third broken spring provided a good excuse, which Guye quickly grabbed. McLaughlin's denial of responsibility for three broken springs seemed shallow and unconvincing, but that is beside the point. Possibly he should have been fired because of the broken springs and his other faults. However, it is quite clear from the record that the real reason he was fired was his union activity, and that his faults and the broken springs provided a convenient excuse. It does not appear that he would have been fired when he was had he not been engaged in union activity.[26]

IV. EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent violated Section 8(a)(3) and (1) of the Act, it will be recommended that Respondent be ordered to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act.

It is recommended that Respondent be ordered to offer immediate and full reinstatement of Kenneth L. McLaughlin to his former job or, if that job no longer exists, to a substantially equivalent job, without loss of seniority or other rights and privileges, and make him whole for any loss of earnings he may have suffered to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as set forth in *Isis Plumbing Co.*, 138 NLRB 716 (1962), and *Florida Steel Corp.*, 231 NLRB 651 (1977).

On the basis of the foregoing findings of fact and on the entire record, I make the following

[26] *Wright Line*, 251 NLRB 1083 (1980).

CONCLUSIONS OF LAW

1. Rowland Trucking Company, a Division of Unichem International is, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Chauffeurs, Teamsters, and Helpers Local 492, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by threatening and interrogating its employees concerning their activities; creating the impression among its employees that their union activity was under surveillance; advising an employee that he was the first to be discharged for union activity, but would not be the last; telling an employee that other emloyees would be discharged for engaging in union activity; informing employees that their union activity was under surveillance by Respondent; and telling employees that it would not allow their union activity, and would seek a reason to discharge an employee because of his union activity.

4. Respondent violated Section 8(a)(3) and (1) of the Act by discharging an employee because of his union activity.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

On the foregoing findings of fact and conclusions of law and on the entire record, I issue the following recommended[27]

ORDER

The Respondent, Rowland Trucking Company, a Division of Unichem International, Carlsbad, New Mexico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Violating Section 8(a)(1) of the Act by threatening and interrogating its employees concerning their activities; creating the impression among its employees that their union activity was under surveillance; advising an employee that he was the first to be discharged for union activity, but would not be the last; telling an employee that other employees would be discharged for engaging in union activity; informing employees that their union activity was under surveillance by Respondent; and telling employees that it would not allow their union activity, and would seek a reason to discharge an employee because of his union activity.

(b) Violating Section 8(a)(3) and (1) of the Act by discharging an employee because of his union activity.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

[27] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Offer Kenneth L. McLaughlin immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent job, without prejudice to his seniority or other rights and privileges, and make him whole for his loss of earnings in the manner set forth in the section of this decision entitled "The Remedy."

(b) Expunge from its records and files any and all references to the discharge of Kenneth L. McLaughlin.

(c) Preserve and, on request, make available to the Board and its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to compute the amount of backpay due under the terms of this Order.

(d) Post at its place of business in Carlsbad, New Mexico, copies of the attached notice marked "Appendix."[28] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

All allegations of the complaint not found herein to have been proved are dismissed in their entirety.

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[28] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."